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Worker's Compensation Law

I. SLANDER FALLS OUTSIDE SCOPE OF EXCLUSIVE REMEDY PROVISION

In *Loges v. Mack Trucks, Inc.*,[1] the South Carolina Supreme Court unanimously held that actions for intentional infliction of emotional distress and assault and battery fall within the scope of the exclusive remedy provision of the South Carolina Worker's Compensation Act,[2] but that an action for slander does not.[3] This opinion is a culmination of many fragmented decisions in worker's compensation law. The court attempted to harmonize its previous holdings and to create a workable standard to determine what actions fall within the worker's compensation exclusive remedy provision.

The appellant, Tina Loges, sued her employer Mack Trucks, Inc. ("Mack Trucks"), and a co-employee, Steven T. Grove, alleging negligent supervision, assault and battery, intentional infliction of emotional distress, and slander.[4] The complaint alleged that during their employment with Mack Trucks, Grove sexually harassed Loges both on the work premises and while traveling to and from work.[5] The parties stipulated that Loges routinely reported these incidents to management, that Mack Trucks assured her that disciplinary action would be taken, and that her supervisors issued verbal and written warnings to Grove.[6] Mack Trucks moved for summary judgment, arguing that the plaintiff had an exclusive remedy for her causes of action under the South Carolina Worker's Compensation Act.[7] The trial court granted the motion

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1. ___ S.C. ___, 417 S.E.2d 538 (1992).

2. *Id.* at ___, 417 S.E.2d at 540. The exclusive remedy provision states in pertinent part:

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee . . . as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

S.C. CODE ANN. § 42-1-540 (Law. Co-op. 1985).

3. *Loges*, ___ S.C. at ___, 417 S.E.2d at 540.

4. *Id.* at ___, 417 S.E.2d at 539.

5. *Id.* at ___, 417 S.E.2d at 539. The court describes the incidents of harassment in the complaint as follows:

> The complaint allege[d] that on various occasions Grove publicly called [Loges] a slut, bitch, whore; accused her of committing adultery and of having contracted Acquired Immune Deficiency Syndrome (AIDS); that Grove used his car in an attempt to run her car off the road, threw hardware at her, physically pushed her, and anonymously sent flowers to her on Valentine's Day, then denied doing so.

Id. at ___, 417 S.E.2d at 539.

6. *Id.* at ___, 417 S.E.2d at 539.

7. *Id.* at ___, 417 S.E.2d at 539-40. Mack Trucks further argued that summary judgment was appropriate because no cause of action for negligent supervision exists in South Carolina. Brief of Respondent at 1. The court did not address this contention because it disposed of the

and dismissed Loges's complaint.[8] The supreme court affirmed, excepting the slander allegation, which it reasoned was not barred by the Act's exclusivity provision.[9]

The supreme court determined that the exclusive remedy of the Worker's Compensation Act absorbs a claim for intentional infliction of emotional distress, yet allows a separate slander action.[10] The court explained that the worker's compensation remedy is only exclusive with regard to personal injuries.[11] Relying on its decision in *Dockins v. Ingles Markets, Inc.*,[12] the court concluded that because slander is an injury to reputation and not a personal injury, the Act's exclusivity provision does not bar the slander action.[13] The court qualified this distinction, asserting that emotional injuries accompanying slander are necessarily personal injuries and, therefore, are subsumed by the exclusivity provision.[14]

Assault and battery and intentional infliction of emotional distress are personal injuries within the scope of the Worker's Compensation Act.[15] Relying on *Doe v. South Carolina State Hospital*,[16] the court determined that no physical manifestation is required to bring an injury within the ambit of the exclusivity provision.[17] The court distinguished the *Doe* ruling from its previous decision in *Stewart v. McLellan's Stores Co.*,[18] upon which Loges relied.[19] The *Stewart* decision seemed problematic because it held that the plaintiff could bring a common law action against her supervisor for willful and malicious physical assault and was not limited to the worker's compensa-

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motion under the terms of the Act's exclusivity provision.

8. *Loges*, ___ S.C. at ___, 417 S.E.2d at 539.

9. *Id.* at ___, 417 S.E.2d at 541.

10. *Id.* at ___, 417 S.E.2d at 540.

11. *Id.* at ___, 417 S.E.2d at 540 (citing Doe v. South Carolina State Hosp., 285 S.C. 183, 186, 328 S.E.2d 652, 654 (Ct. App. 1985)).

12. 306 S.C. 287, 411 S.E.2d 437 (1991).

13. *Loges*, ___ S.C. at ___, 417 S.E.2d at 540.

14. *Id.* at ___, 417 S.E.2d at 540; *see infra* text accompanying notes 15-22.

15. *Id.* at ___, 417 S.E.2d at 540; *see also* Powell v. Vulcan Materials Co., 299 S.C. 325, 384 S.E.2d 725 (1989) (holding that mental injury is compensable under the Worker's Compensation Act if incident to unusual and extraordinary conditions of employment); Stokes v. First Nat'l Bank, 298 S.C. 13, 377 S.E.2d 922 (Ct. App. 1988) (holding that mental injury suffered as a result of nonphysical stress incident to unusual and extraordinary conditions in employment is compensable), *aff'd*, 306 S.C. 46, 410 S.E.2d 248 (1991).

16. 285 S.C. 183, 328 S.E.2d 652 (Ct. App. 1985).

17. *Loges*, ___ S.C. at ___, 417 S.E.2d at 540; *accord Powell*, 299 S.C. at 328, 384 S.E.2d at 726; *Stokes*, 298 S.C. at 21, 377 S.E.2d at 926.

18. 194 S.C. 50, 9 S.E.2d 35 (1940). The court stated that "[a] distinction must be drawn between injury excluded under the fundamental coverage provisions of the Act and injury which is covered but for which, under the facts of the particular case, no compensation is payable." *Loges*, ___ S.C. at ___, 417 S.E.2d at 540.

19. *Loges*, ___ S.C. at ___, 417 S.E.2d at 540.

tion exclusive remedy, in part, because her injury had no physical manifestation.[20] However, in *Thompson v. J.A. Jones Construction Co.*[21] the court confined *Stewart* to its facts and implicitly rejected the notion that absent a physical manifestation, a plaintiff will have a common law action against the employer.[22] Therefore, after *Thompson* the court could determine that Loges's emotional injuries fell within the Act without physical disability on her part.

The court then analyzed whether Loges's injury comported with the statutory requirement that it arise out of and in the course of employment.[23] Relying on *Carter v. Penney Tire & Recapping Co.*,[24] the court found that because Loges informed Mack Trucks of her problem with Grove and because Mack Trucks failed to provide adequate relief or protection, the injury necessarily arose out of the plaintiff's employment.[25] The court noted that "[a]ppellant cannot argue that her employer failed to provide protection and yet maintain that her injury did not arise out of employment."[26] Consequently, Loges's allegation that Mack Trucks' inadequate employee supervision caused her to suffer damages flowing from intentional infliction of emotional distress conflicted with her claim that her injury did not arise out of her employment.[27] The court also determined that Loges's injury arose in the course of employment, a term which "refers to the time, place and circumstances under which the accident occurs."[28] The court efficiently disposed of this issue by noting that the record clearly showed the bulk of Grove's harassing conduct occurred on the employer's premises.[29]

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20. *Stewart*, 194 S.C. at 55-56, 9 S.E.2d at 37. The *Stewart* court stated:

> To say that an intentional and malicious assault and battery by an employer on an employee is such an accident is a travesty on the use of the English language; and the travesty becomes the more pronounced when it is argued that the employee is restricted for his recovery to the provisions of the Workmen's Compensation Act, although no physical disability, which alone entitles him to compensation under the Act has been suffered. Such construction gives to the employer who committed the assault and battery complete immunity for his offense, because it deprives the employee of his right of action at common law.

Id.

21. 199 S.C. 304, 19 S.E.2d 226 (1942).

22. *Id.* at 313, 19 S.E.2d at 230, *cited in Loges*, ___ S.C. at ___, 417 S.E.2d at 540.

23. *Loges*, ___ S.C. at ___, 417 S.E.2d at 540-41; *see* S.C. CODE ANN. § 42-1-160 (Law. Co-op. 1985) ("'*Injury*' and '*personal injury*' shall mean only injury by accident arising out of and in the course of employment . . . .").

24. 261 S.C. 341, 200 S.E.2d 64 (1973).

25. *Loges*, ___ S.C. at ___, 417 S.E.2d at 541.

26. *Id.* at ___, 417 S.E.2d at 541.

27. *Id.* at ___, 417 S.E.2d at 541.

28. *Id.* at ___, 417 S.E.2d at 540 (citing Eargle v. South Carolina Elec. & Gas Co., 205 S.C. 423, 32 S.E.2d 240 (1944)).

29. *Id.* at ___, 417 S.E.2d at 540.

Accordingly, the supreme court affirmed the lower court's dismissal of Loges's claim for intentional infliction of emotional distress and assault and battery because these injuries fell within the scope of the Worker's Compensation Act.[30] The court reversed the grant of summary judgment on the slander issue because slander is not a personal injury under the Act.[31]

Over the past three years the South Carolina courts have decided several cases construing the breadth of the Worker's Compensation Act's exclusive remedy provision; more specifically, the courts have analyzed its application to employees' common law actions for intentional infliction of emotional distress against employers and co-employees. *McSwain v. Shei*[32] was the first modern case to construe the worker's compensation exclusivity provision as it relates to an employee's action for intentional infliction of emotional distress. Marie McSwain alleged that her employer forced her to perform certain physical exercises on the job that he knew would aggravate an embarrassing bladder problem.[33] While the court recognized that McSwain satisfied the four elements of a claim for intentional infliction of emotional distress,[34] it clearly held that McSwain's action was outside the scope of the exclusivity provision because her injury was intentional, not accidental.[35] The court noted that "[t]he exception to the exclusivity provision is based upon the nature of the act that caused the injury—whether it was intentional or accidental. Only injuries caused by an 'accident' are within the jurisdiction of the Commission. Intentional infliction of emotional distress is not an 'accident.'"[36] The court apparently based its conclusion—that employers who deliberately harm employees may not assert the worker's compensation

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30. *Loges*, ___ S.C. at ___, 417 S.E.2d at 541.

31. *Id.* at ___, 417 S.E.2d at 541.

32. 304 S.C. 25, 402 S.E.2d 890 (1991) (holding that the Worker's Compensation Act did not bar an employee from bringing an action for intentional infliction of emotional distress against the employer).

33. *Id.* at 27, 402 S.E.2d at 891.

34. *Id.* at 28-29, 402 S.E.2d at 891-92. The four elements of intentional infliction of emotional distress are as follows:

> (1) [t]he defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so 'extreme and outrageous' as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious, and utterly intolerable in a civilized community;' (3) the actions of defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was 'severe' so that 'no reasonable man could be expected to endure it.'

Ford v. Hutson, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981) (citations omitted) (quoting Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 154 (Me. 1979)), *quoted in McSwain*, 304 S.C. at 28, 402 S.E.2d at 891.

35. *McSwain*, 304 S.C. at 31, 402 S.E.2d at 893.

36. *Id.* at 29, 402 S.E.2d at 892. (citing 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 68.11 (1993)).

exclusivity provision as a bar to the employees' common law actions against them—upon public policy considerations because this conclusion was unsupported by precedent.[37]

The court finally noted that McSwain suffered emotional distress and physical injury. Precedent mandated that an injury with a physical manifestation is a "personal injury" which brings an employee's remedy within the worker's compensation exclusivity provision.[38] However, the court rejected this view, explaining "that the focus of the inquiry should be on the intentional and outrageous nature of the act rather than the resulting injuries."[39]

The *Loges* holding contrasts starkly with *McSwain*. The court determined that Loges's claim for intentional infliction of emotional distress fell within the exclusive remedy doctrine, even though the injury was deliberately imposed and no physical manifestation accompanied the injury.[40] The inconsistencies are apparent; the court follows the same line of reasoning in each case, but reaches contrary results. In *McSwain* the court proclaimed that employers should not be permitted to use the worker's compensation remedial statute to shield themselves from liability for their intentional wrongs.[41] Why should the strong policy reasons behind this holding fail to apply to a co-employee who engages in equally culpable conduct? Why is a co-employee's intentional injury an "accident" in the workplace when the same act committed by the employer is not?[42]

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37. The court summarized its reasoning by declaring, "we do not believe that the compensation laws were enacted to protect an employer where he deliberately and intentionally inflicts such outrageous action upon an employee to cause him emotional distress." *Id.* at 30, 402 S.E.2d at 892. Arguably, the *Stewart* decision resulted in a similar holding. *See supra* note 20 and accompanying text. However, McSwain claimed physical assault. Stewart claimed purely mental injury. Stewart v. McLellan's Stores Co., 194 S.C. 50, 9 S.E.2d 35 (1940).

38. "Where there are physical injuries, any accompanying mental injuries resulting from the same accident may not be segregated in an attempt to render the Act non-exclusive with respect to the mental stress." Doe v. South Carolina State Hosp., 285 S.C. 183, 190, 328 S.E.2d 652, 656 (Ct. App. 1985); *cf.* Skipper v. Southern Bell Tel. & Tel. Co., 271 S.C. 152, 246 S.E.2d 94 (1978) (finding that a physical assault by a supervisor upon an employee rendered moot the claim that the employee suffered mental injury resulting solely from mental stimuli).

39. *McSwain*, 304 S.C. at 30, 402 S.E.2d at 892. Perhaps the court shed more light on its reasoning in Dockins v. Ingles Markets, Inc., 306 S.C. 287, 411 S.E.2d 437 (1991). Although *Dockins* involved a slander action, the rationale seems to apply here. The court stated that "'to block the main thrust of this action because of peripheral items of damage, when a compensation claim could not purport to give relief for the . . . injury to the reputation, would be incongruous, and outside the obvious intent of the exclusiveness clause.'" *Id.* at 288, 411 S.E.2d at 438 (quoting Foley v. Polaroid Corp., 413 N.E.2d 711, 715 (Mass. 1980)). Neither court defined this "obvious intent."

40. *Loges*, ___ S.C. at ___, 417 S.E.2d at 541.

41. *McSwain*, 304 S.C. at 30, 402 S.E.2d at 892; *see supra* notes 32-39 and accompanying text.

42. Granted, an injury inflicted upon an employee by a co-employee may be accidental and

The Supreme Court of South Carolina has now addressed these questions. When this article was first drafted, immediately following the *Loges* opinion, *Dickert v. Metropolitan Life Insurance Co.* had been recently decided by the court of appeals.[43] The court of appeals held that Dickert, the plaintiff employee, could not maintain a common law action for intentional infliction of emotional distress against her employer and supervisor.[44] Dickert alleged that she suffered the verbal, physical and emotional harassment of her supervisor.[45] The only distinction the *Dickert* court drew between its decision and *McSwain* is that in the latter the employer deliberately inflicted the injury, whereas in *Dickert*, the supervisor (a fellow employee) committed the wrongful acts.[46] The court of appeals reasoned that this distinction rendered *McSwain* inapplicable; consequently barring Dickert's common law claims.[47] The court's cursory analysis of this distinction was unconvincing and unsatisfactory.

The South Carolina Supreme Court resolved the illogical employer/employee distinction in favor of the arguments set forth herein.[48] The supreme court reversed the opinion of the court of appeals "to the extent it holds Co-Employee is absolved of personal liability for his intentional tortious acts committed while in the scope of employment."[49] The *Dickert* court stated that "a co-employee who *negligently* injures another employee while in the scope of employment is immune under the Act and cannot be held personally liable."[50] However, the court held that "it is against public policy

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unexpected from the employer's perspective, thereby allowing the Act to subsume the employee's cause of action against the employer. However, that same injury is *not* accidental from the offending co-employee's perspective. Forcing the injured employee to take only the worker's compensation remedy, while allowing the offender to escape personal liability, seems patently at odds with public policy and the court's own rationale in *McSwain*.

43. 306 S.C. 311, 411 S.E.2d 672 (Ct. App. 1991) (per curiam), *aff'd in part and rev'd in part*, ___ S.C. ___, 428 S.E.2d 700 (1993).

44. *Id.* at 319, 411 S.E.2d at 676. Dickert asserted causes of action against her employer for negligence, breach of contract, assault and battery, intentional infliction of emotional distress and invasion of privacy. She brought actions against her supervisor for assault and battery, intentional infliction of emotional distress, and invasion of privacy. *Id.* at 314, 411 S.E.2d at 674.

45. *Id.* at 314, 411 S.E.2d at 673. The plaintiff alleged that her supervisor subjected her to "loud and threatening criticism of her performance, criticism of her personal appearance, pounding and kicking her desk, shaking his fist at her in a threatening manner, throwing pens at her, and hitting her with a rate book." *Id.* at 314, 411 S.E.2d at 673-74.

46. *Id.* at 322, 411 S.E.2d at 678.

47. *Id.*

48. Dickert v. Metropolitan Life Ins. Co.,___ S.C. ___, 428 S.E.2d 700 (1993).

49. *Id.* at ___, 428 S.E.2d at 702.

50. *Id.* at ___, 428 S.E.2d at 702; *see also* Powers v. Powers, 239 S.C. 423, 123 S.E.2d 646 (1962).

to extend this immunity to the co-employee who commits an *intentional* tortious act upon another employee."[51]

Essentially, the South Carolina courts have determined that an employer may not use the exclusive remedy provision of the Worker's Compensation Act to protect itself from liability for the intentional infliction of emotional distress upon its employee. The Supreme Court of South Carolina resolved the ambiguity surrounding the applicability of the exclusivity provision to claims against a co-employee. In *Dickert* the court allowed a common law action for intentional infliction of emotional distress against a fellow employee because the Act's exclusivity provision should not bar the action as a matter of public policy. Much to the bar's relief, the court has restored order to the previously chaotic treatment of the South Carolina Worker's Compensation Act's exclusive remedy provision.

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51. *Dickert*, ___ S.C. at ___, 428 S.E.2d at 702.